IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3388 OF 2007

Anil B. Jobanputra .. Petitioner

Versus

Suryakant B. Jobanputra .. Respondent

Mr.S.Ratan Kumar Sharma for petitioner

Respondent in person.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 4th December 2007

P.C.

. This petition is filed challenging the order passed by the trial court on 3rd March 2007 in Notice of Motion No.3 of 2007.

2. The petitioner is the original defendant in Suit No.5863 of 1990 pending on the file of the City Civil Court, Mumbai by the respondent appearing in person who is plaintiff therein.

3. Notice of motion No.3 of 2007 was moved by the present petitioner praying that the written statement which is already filed be taken on record in the suit and the delay be condoned.

4. In the affidavit in support of the notice of motion, the petitioner pointed out that hearing of the said suit was stayed by an order passed on 19th January 1999 in a notice of motion for stay of the suit taken out by the present petitioner defendant. Thereafter, the suit was dismissed in default on 29th November 1999 on the ground of absence of plaintiff. Plaintiff applied for restoration of the suit and an order passed in that behalf is dated 21st October 1999. Thereafter, petitioner served a copy of the

written statement in the suit on the present respondent - plaintiff. However, the written statement could not be filed in the court and that is how the notice of motion was taken out.

5. The notice of motion was opposed by the respondent plaintiff on the ground that the suit is filed in the year 1990 and the motion is taken out after 16 years on 18th December 2006. Respondent pointed out that there is an earlier suit being Suit No.6734 of 1983 filed between the same parties and in respect of the same subject matter. The petitioner defendant had filed earlier suit against the respondent and that suit was dismissed on 28th September 2006. The Notice of Motion No.3959 of 2006 taken out in the earlier suit which was filed by the present defendant petitioner before me, was also dismissed. The learned Judge has not disputed all these factual aspects. Learned Judge has also referred to Roznama of the suit. It is

apparent from the Roznama that the suit was stayed pending disposal of earlier suit but thereafter, the court directed parties to complete the pleadings. While it may be true that the reason for delay is that the writ of summons was not served and the same is not found favour with, yet, it cannot be said that the petitioner is negligent in the matter. The suit itself was dismissed and restored and thereafter taken on board after two years. On 22nd January 2004, the suit was adjourned sine die and it was taken on board on 11th August 2005. In such circumstances, merely because the defendant did not tender the written statement on record, copy of which was already served on the plaintiff on 21st October 1999, does not mean that the notice of motion must be dismissed. The amended C.P.C., if at all it applies, does not preclude the court from taking written statement on record in appropriate cases. In the facts and circumstances of the present case, when the court

itself took up the suit intermittently and initially had dismissed it for default, the request of the petitioner to take on record the written statement, a copy of which had already been served on other side, was reasonable and ought to have been granted by compensating respondent plaintiff by payment of costs. This course of action would have been in the interest of justice. The Court having not adopted this course but refused to exercise its discretion in favour of petitioner has resulted in non application of mind as well as improper and erroneous exercise of discretion. The discretion should have been exercised judiciously and to sub-serve interest of justice. In such circumstances, the order under challenge is set aside. Written statement be now taken on file of Suit No.5863 of 1990. However, the petitioner to pay costs to the respondent quantified at Rs.2000/- within a week from today. Petition allowed.

(S.C.Dharmadhikari, J)